



POLICE DEPARTMENT

October 19, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Yuseff Hamm
Tax Registry No. 928455
106 Precinct
Disciplinary Case No. 2011-5940

Police Officer Leonardo Aristilde
Tax Registry No. 942752
63 Precinct
Disciplinary Case No. 2012-6896

The above-named members of the Department appeared before me on June 20, 2012,
charged with the following:

Disciplinary Case No. 2011-5940

1. Said Police Officer Yuseff Hamm, assigned to the 104th Precinct, while on-duty, on or about October 9, 2011, inside of the 104th Precinct Stationhouse, in Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer, while holding his O.C./pepper spray canister pointed at Police Officer Leonardo Aristilde, sprayed a substance into the mouth of Police Officer Leonardo Aristilde.

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Said Police Officer Yuseff Hamm, assigned to the 104th Precinct, on or about October 9, 2011, made false and or misleading statements to Department investigators when questioned about an incident that had occurred between him and Police Officer Leonardo Aristilde on October 9, 2011. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

Disciplinary Case No. 2012-6896

1. Said Police Officer Leonardo Aristilde, assigned to Manhattan Court Section, while on duty, on or about October 9, 2011 at a location known to the Department in Queens County, did

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wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Police Officer made misleading statements at a PG 206-13 hearing conducted by Sergeant Brian Magin, Patrol Borough Queens North Investigation Unit.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Mark Berger, Esq. and Daniel Maurer, Esq., Department Advocate's Office. Respondent Hamm was represented by Michael Martinez, Esq., and Respondent Aristilde was represented by John Arlia, Esq.

Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2011-5940

Respondent Hamm is found Guilty of Specification No. 1. He is found Not Guilty of Specification No. 2.

Disciplinary Case No. 2012-6896

Respondent Aristilde is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Edward Reiman, Lieutenant Thomas Maloney, and Police Officer John Ricottone as witnesses.

Sergeant Edward Reiman

Reiman testified that on October 9, 2011, he worked as the Patrol Supervisor for the second platoon (7:05 a.m. to 3:40 p.m.) with Respondent Aristilde and Respondent Hamm. He said Respondent Hamm was assigned to the Critical Response Vehicle detail (CRV) and Respondent Aristilde was assigned to the telephone switchboard (TS). However, Reiman, Sergeant [Petamber Nagasar] and Lieutenant Thomas Maloney changed Respondent Hamm's assignment to precinct patrol because Respondent Hamm was a "very active and hard working officer, he has a lot of arrests and responds to jobs in a quickly and timely manner."

Reiman said Respondent Aristilde's assignment was changed to CRV because "somebody had to go so [Respondent Aristilde] was chosen." During roll call Respondent Aristilde and Respondent Hamm were notified of their assignment change. After roll call concluded and as Respondent Aristilde was leaving the muster room, Respondent Hamm looked over at Respondent Aristilde and mentioned something about "time on the job or indicating that he had seniority over him." Reiman said Respondent Hamm repeated this comment to Respondent Aristilde a couple of times.

Reiman stated that Respondent Aristilde left the muster room and then returned a short time later to ask Reiman about his change of assignment. When Respondent Aristilde entered the muster room, Reiman said, Respondent Hamm was towards the center and on the right side of the room and Reiman was talking to Police Officer Scarlet Sanchez, Respondent Hamm's partner for the day. Respondent Hamm approached Respondent Aristilde and stood approximately three feet from him and then Respondent Aristilde stepped up approximately one foot towards Respondent Hamm.

Reiman did not recall hearing any verbal exchange between Respondent Aristilde and Respondent Hamm. Reiman noticed Respondent Hamm and Respondent Aristilde “pretty much face to face” and then noticed Respondent Hamm “holding a canister in his hand and pointing it towards Respondent Aristilde.” Reiman recognized the canister to be a “Mace [Oleoresin Capsicum or O.C. pepper spray] canister top.”

Reiman stated that he observed Respondent Hamm’s finger “between the safety, I guess, level on the top and the actual trigger discharge button,” and that the flap of the canister had been lifted. While Respondent Hamm held the O.C. pepper spray canister, Respondent Aristilde faced Respondent Hamm and opened his mouth. Reiman then observed “a stream which I know to be consistent with a discharge of a Mace canister and I saw it come out of the top that I saw [Respondent] Hamm holding.” He said the stream was a “thin non-dis[pe]rsing stream that pretty much stays consistent with a water squirt gun.” Respondent Aristilde and Respondent Hamm were standing one foot apart, and the O.C. pepper spray canister was no more than six inches away from Respondent Aristilde’s mouth.

After the discharge, Reiman heard Respondent Hamm say something like, “[W]hat do you think about that.” Respondent Aristilde spat on the floor and “rapidly” exited the muster room.

Respondent Aristilde was coughing when he re-entered the muster room and told Reiman that he could not go to CRV. Reiman left the muster room, found Respondent Hamm and told him to stand by. Reiman informed Maloney about the incident. Reiman observed Respondent Aristilde going to the back of the precinct and then later found him, by himself, inside the bathroom on the first floor.

Inside the bathroom, Reiman and Maloney observed Respondent Aristilde in the stall closest to the wall with his “toes pointing down and his he[e]ls pointing up indicating that he was kneeling” in front of the toilet. The stall door was closed, but Reiman observed Respondent Aristilde from the opening under the door. Reiman heard Respondent Aristilde coughing and “it sounded like he was trying to throw up into the toilet.” Reiman asked Respondent Aristilde if he needed an ambulance but Respondent Aristilde refused, and when Reiman asked what had occurred, Respondent Aristilde replied, “[Y]ou know what happened.”

Reiman testified that Respondent Aristilde was in the men’s room for approximately ten minutes. Reiman returned to the bathroom and offered Respondent Aristilde some water. Respondent Aristilde did not accept the water and did not say anything about the incident.

Reiman testified that later that day, subsequent to an investigation by a lieutenant and a sergeant from the Patrol Bureau Queens North Inspections Unit, he vouchered Respondent Hamm’s O.C. pepper spray. Department’s Exhibit (DX) 1 is a photograph of Respondent Hamm’s O.C. pepper spray and his throat lozenge spray. It was stipulated by both parties that Respondent Hamm produced the throat lozenge spray as an explanation of what was actually sprayed.

Reiman said he did not observe anything else in Respondent Hamm’s hand other than the O.C. pepper spray. He had never seen the throat lozenge spray until observing it at this trial.

During cross-examination, Reiman said the roll call office initially designated Respondent Hamm for CRV and he agreed that Respondent Hamm would have been given a few days notice of the assignment. Reiman said he verbally notified Respondent Aristilde of his assignment change, but after roll call concluded, Respondent Aristilde returned to the muster

room and requested a written notification. Reiman said when Respondent Aristilde asked for a written notification, Reiman asked Sanchez for her notification, but she could not find it.

Reiman said he was about ten feet away, looking at the sides of Respondent Aristilde and Respondent Hamm's bodies as they were facing each other. Respondent Aristilde was on Reiman's right side and Respondent Hamm was on his left side. Reiman did not recall which hand Respondent Hamm was holding the O.C. pepper spray canister in and did not observe him remove the O.C. pepper spray canister out of its holster, but Reiman noticed the canister in Respondent Hamm's hand when "they stepped up to each other."

Reiman did not observe any physical confrontation between Respondent Aristilde and Respondent Hamm. Respondent Hamm discharge the O.C. pepper spray into Respondent Aristilde's open mouth, although Reiman could not say if his mouth was open to say something or if it was open to "tempt" Respondent Hamm. Reiman said that after Respondent Hamm sprayed Respondent Aristilde, Respondent Hamm held the O.C. pepper spray to his side. Reiman did not take Respondent Hamm's O.C. pepper spray away from him but told him to stand by.

He stated that police officers, when taking police action, are trained to spray the O.C. pepper spray "in an S fashion amongst the face," and if sprayed in someone's mouth, coughing and "dry heaving" might result. He agreed that he had no experience in O.C. pepper spray other than what he was taught in the Police Academy, and that he had never discharged his O.C. pepper spray.

Reiman believed that if someone had been sprayed with O.C. pepper spray and had trouble breathing, Reiman would call an ambulance, render aid and provide water. He did not call an ambulance nor request medical attention for Respondent Aristilde. Reiman, after he

observed Respondent Aristilde cough and dry heave, asked if he needed medical attention, but Respondent Aristilde refused. Reiman stated that it appeared as if Respondent Aristilde wanted or needed medical attention and he brought Respondent Aristilde a cup of water but Respondent Aristilde refused to take it.

Reiman said there were 10 other people in the muster room at the time of the incident, but did not recall if anyone tried to physically separate Respondents. Reiman stated that it was “[a] matter of seconds” from the time Respondent Aristilde was sprayed until the time he returned to the muster room and told him that he was not going to CRV. Reiman admitted that he did not give Respondent Hamm a chance to explain what had occurred because he wanted to conduct an official investigation. Reiman acknowledged that he and Respondent Aristilde were interviewed by the Inspections Unit.

Reiman agreed that Respondent Aristilde did not say that Respondent Hamm had sprayed him with O.C. pepper spray and he agreed that Respondent Aristilde’s eyes were not bloodshot. Reiman further agreed that no one in the muster room received medical attention after the spray was discharged and no one complained about itchy eyes.

During redirect examination, Reiman stated he was about 90 percent sure that he observed Respondent Hamm’s thumb depress the trigger on the O.C. pepper spray.

During re-cross-examination, Reiman agreed that Respondent Aristilde did not have bloodshot eyes, a runny nose, teary eyes or difficulty breathing when Respondent Aristilde returned to the muster room. Reiman interpreted the comments between Respondents about “time on the job” as “disrespectful to Aristilde, like in your face.” He said Respondent Aristilde appeared to be unhappy after learning that he had been assigned to CRV.

While Respondent Aristilde was in the bathroom, Reiman and Maloney asked him what had happened. Reiman acknowledged that Respondent Aristilde is a “proud boxer.”

During redirect examination, Reiman stated he observed the spray stream enter directly into Respondent Aristilde’s mouth. Reiman said that Respondent Hamm did not rotate his body so as to reveal that he was holding a throat lozenge spray in his hand.

Lieutenant Thomas Maloney

Maloney, a 20-year member of the Department, was assigned as the Platoon Commander on October 9, 2011, and was working from 6:45 a.m. to 3:30 p.m. Maloney testified that he directed the sergeants to make changes on the roll call with respect to both Respondents’ assignments. He said that Respondent Hamm was a stronger worker than Respondent Aristilde and so he wanted to keep Respondent Hamm in the precinct.

Maloney was not present during roll call which took place between 7:15 a.m. and 7:20 a.m. He said that after roll call concluded, Reiman informed him that “Aristilde was Maced.” Maloney, in disbelief, went to the bathroom to check on Respondent Aristilde’s condition and heard him coughing and wheezing. Maloney asked Respondent Aristilde if he was okay and if he needed an ambulance, but Respondent Aristilde refused.

After Respondent Aristilde told Maloney that he was okay, Maloney left the bathroom and went to notify the Commanding Officer. Maloney heard Reiman ask Respondent Aristilde what happened, to which Respondent Aristilde responded, “[Y]ou know what happened.” Respondent Aristilde did not mention anything about a throat spray or breath spray while they were in the bathroom.

During cross-examination, he acknowledged that Respondent Aristilde did not say that he had been sprayed with O.C. pepper spray by Respondent Hamm. Maloney agreed that a dispute between Respondents regarding their assignment preceded the incident. He also agreed that there were no previous indications that there were any problems between Respondents. After the incident, Respondent Hamm waited in the muster room and Respondent Aristilde waited in the 124 room.

Maloney could not recall whether he had discharged his O.C. pepper spray during his 20 years with the Department. He agreed that O.C. pepper spray should be discharged in the general face area and it would not be appropriate to spray it directly in the mouth because "it would probably kill someone if you did that...Because Mace is pretty potent." Maloney further agreed that a person would need medical attention if he was sprayed directly in the throat.

Maloney acknowledged that based on his observation of Respondent Aristilde's physical condition, he did not think it was necessary to get medical attention for him. He agreed that O.C. pepper spray should not be discharged indoors because "you are going to have everyone that is going to be Mace inside and everyone is going to be touched by it." He added, "In large crowds, I have seen Mace used and it irritates all the people around the area." He agreed that the ten officers in the muster room were not affected by the spraying.

In the bathroom, Maloney went up to the stall, looked between the door and saw Respondent Aristilde's head in the toilet bowl trying to cough. Maloney did not know if Respondent Aristilde "popped his head out" at some point because Maloney was not looking at the stall the entire time nor did he know whether Respondent Aristilde lifted his head or where his face was positioned when he was responding to Maloney and Reiman's questions.

Police Officer John Ricottone

Ricottone, a seven-year member of the Department, worked the second platoon on October 9, 2011, and he was assigned to the 124 room. Ricottone was not present during roll call and reported to the 124 room at approximately 7:10 a.m. Ricottone stated that at approximately 8:20 a.m., he became aware of the incident because Respondent Aristilde, after being sent to the 124 room by Reiman, told Ricottone that he was sprayed with O.C. pepper spray by Respondent Hamm during roll call.

Ricottone said Respondent Aristilde remained in the 124 room the entire day and he did not engage in further conversation with Respondent Aristilde because he was busy with a lot of work. Ricottone agreed that Respondent Aristilde did not mention anything about any kind of spray.

During cross-examination, Ricottone acknowledged that during his official Department interview, he stated that Respondent Aristilde made a complaint about Respondent Hamm's but that by "complaint" Ricottone did not mean a formal complaint, but rather, he meant that Respondent Aristilde just said "that he was Maced."

The parties stipulated to the following facts regarding the interviews that were conducted of members of the service (MOS) who were present in the muster room at the time of this incident: That no MOS stated that he or she had seen any confrontation or anything being sprayed; that no MOS stated that he or she had smelled any O.C. pepper spray; and that no MOS who was present in the muster room at the time of the discharge, other than Respondent Aristilde, claimed to have had any ill affects post-discharge. The parties also stipulated that Respondents "horsed around a lot."

Respondents' Case

Each Respondent testified in his own behalf.

Respondent Hamm

Respondent Hamm, a ten-year member of the Department, worked in the 104 Precinct at the time of the incident in question. He said he has over 500 arrests in his career thus far.

Respondent Hamm testified that on October 9, 2011, he was assigned to CRV, which took place outside of the confines of the precinct.

He said that after he changed into his uniform, and before roll call was conducted, he stopped by the front desk and was notified by Reiman that he was being reassigned to precinct patrol. Respondent Hamm said he was surprised to learn that he was not going to CRV because it is "usually cancelled before the day I show up."

Respondent Hamm explained that his assignments to CRV are usually cancelled because "they really appreciate the experience that I have on the job and with the mentorship of the other officers and the response to other jobs and I how I handle jobs basically." He described his relationship with Respondent Aristilde as, "At the time and it is still the same, we are really good friends. I don't have anything bad to say about him. He is a really good man."

He said, "Work-wise...Aristilde was never in a busy command so his tactics were what I would call, horrible. I constantly got on him about his tactics. I constantly ribbed him about how he addressed people, how he addressed situations..." He also added that Respondent Aristilde is a "great cop."

At roll call, Respondent Aristilde was notified that he was going to CRV instead of Respondent Hamm. Respondent Hamm said, "Well as usual we have a daily banter, a ribbing. I

am constantly ribbing him over everything from his accent and interaction with other Haitian officers, his shoes. I hate the way he had his shoes and they were never shined and things like that so our relationship was really good.”

Respondent Hamm testified that after Respondent Aristilde was notified about CRV, he stood at the door and asked for the location and the official notification of the CRV. Respondent Hamm then told Respondent Aristilde, “[R]ookie, I got time on the job, you don’t have time on the job, go to CRV” while he pointed at the 10-year longevity bar on his shirt. Respondent Hamm said that everyone in roll call was present when he made such remarks and agreed that it is not unusual to “bust [Respondent Aristilde’s] chops.”

Respondent Hamm then told Respondent Aristilde the location of CRV, but did not give him the official notification. Respondent Aristilde left the muster room and then returned and asked Respondent Hamm for the notification. Respondent Hamm replied,

[R]ookie, shut your mouth and go to CRV. [Respondent Aristilde] said, shut my mouth for me. I said okay. I had my radio in my hand and put the radio down and I turned away from everyone and I put the radio on the table and as I turned around, I took with my left hand, I took my Mace out of my pocket, but on top of my gun pouch, between the gun pouch and the -- magazine pouch...between the magazine pouch and my belt, I had my throat spray.

Respondent Hamm stated that he carried a throat spray because, twice a year, October and April, he suffered from allergies and used the spray when his throat bothered him. It is an over the-counter throat spray which he purchased from a drugstore, and he had used the spray just minutes before roll call.

Respondent Hamm said that Respondent Aristilde said, “[W]hy don’t you shut it for me?” and then Respondent Aristilde leaned his head back and “I took out my Mace with my left hand and switched it to my right and when I had the objects in my right hand, I brought it to his

mouth and said, psst. He spit it out, he said, you're an ass and he turned around and walked out of the muster room."

Respondent Hamm testified that he sprayed Respondent Aristilde with his throat spray and made a "psst" sound effect. He said he did not have his finger on the button underneath the safety cap of the O.C. pepper spray canister, and he did not discharge his O.C. pepper spray. He explained that his behavior that day was "just tomfoolery. We fool around all the time, it was just horse play. Just things friends do and it was not meant to hurt anybody." He said no other members of the service present at roll call had a reaction as a result of the incident.

After the incident, Respondent Hamm went upstairs to get his bag and paperwork and when he came downstairs, Reiman told him to stand by. Respondent Hamm said he tried to explain to Reiman what had just occurred but Reiman was not interested in talking to him. He said that until the instant trial, he had not been questioned regarding the incident and even during his official Department interview, he was not asked to describe his side of the story.

Respondent Hamm said his official Department interview was conducted at approximately 4:00 p.m., so from 7:40 a.m. onward he stayed in the muster room and watched television. Since the incident, Respondent Hamm said his relationship with Respondent Aristilde is the same and that they speak on the phone regularly. After his official Department interview, Respondent Hamm was suspended for 31 days, placed on modified duty status, and transferred to the Brooklyn Court Section.

Respondent Hamm stated that there was an instance where he discharged his O.C. pepper spray and "it consumed the whole room and whoever walked into that room felt the effects of it. Their eyes were burning and the different affects of it."

During cross-examination, Respondent Hamm agreed that during his official Department interview, dated October 9, 2011, he had stated Respondent Aristilde choked when he was sprayed. Respondent Hamm agreed that the stream from the throat spray was dispersed and not a "straight pinpoint spray." While he had his back towards Respondent Aristilde, Respondent Hamm stated that the throat spray was between his magazine pouch and his body and that the cap of the throat spray was still on, and then in one motion, he turned around and took the O.C. pepper spray out of his left hand and also removed the cap off the throat spray.

Respondent Hamm further agreed that during his official Department interview, he had indicated that after he sprayed Respondent Aristilde in the mouth, Respondent Aristilde "batted" his hand knocking the Mace canister out of his hand. The O.C. pepper spray fell to the floor but the throat spray container did not and remained in his hand.

Respondent Aristilde

Respondent Aristilde, a six-year member of the Department, testified he first met Respondent Hamm in February, 2010, and his relationship with Respondent Hamm "snowballed into a mentorship. He is like an older brother. I call him for advice about police work. I call him for advice about family incidents." Presently, he and Respondent Hamm maintain the same kind of relationship.

Prior to becoming a member of the Department, Respondent Aristilde was employed as an emergency medical technician (EMT). As an EMT, Respondent Aristilde had encountered people that had been exposed to O.C. pepper spray.

Respondent Aristilde testified that he was working on October 9, 2011, and that Respondent Hamm's depiction of what had transpired that day is "100% accurate." Respondent

Aristilde, after being sprayed, first thought that he had been sprayed with O.C. pepper spray, but, in a couple of seconds, he realized that it was not O.C. pepper spray. He agreed that he had reacted by slapping Respondent Hamm's hand but that such slapping "is daily with us. It was all in good fun." He did not know what substance he was sprayed with but thought it was some kind of mint or Binaca breath spray.

He explained that he was familiar with that type of spray from his experience as an EMT. He said when he learned that the spray was a lozenge, he knew it was an analgesic and contained a numbing agent. After being sprayed, Respondent Aristilde said he was shocked and that he tried to spit it out "I tried to heave it up to like hack it out."

Respondent Aristilde agreed that he went to the bathroom and described his cough as "hacking, a very strong cough like in the back of your throat." Respondent Aristilde did not deny that he was in the bathroom stall, over the toilet bowl. He denied feeling any sort of discomfort or respiratory problems after the incident. Respondent Aristilde stated that at some point after the incident he told Ricottone that "they think that [Respondent] Hamm Maced me." Prior to speaking to Ricottone, Respondent Aristilde had told Reiman and Maloney that he was not sprayed with O.C. pepper spray, but they insisted that he was. Respondent Aristilde said that he would have ended his friendship with Respondent Hamm if Respondent Hamm discharged his O.C. pepper spray at him.

Respondent Aristilde stated that while he was in the bathroom stall and after he finished coughing, he used the facility for his personal business. He said a few minutes had elapsed from the time he was sprayed until the time he was in the stall. Also, while he was in the stall, he responded to Reiman's inquiry with "You know what happened" because, like he stated in his official Department interview, "I was embarrassed. I didn't want to talk about especially right

then and there like two minutes after it happened. When he asked me, I thought he was kind of gloating me like, what happened.” He continued, “I said Sergeant, I don’t want to talk to you about what happened, you know what happened, give me some space, leave me alone for a few.”

Furthermore, Respondent Aristilde stated he did not recognize Maloney’s voice while in the stall because Maloney had only been in the precinct for a couple of months. After hearing Maloney’s voice Respondent Aristilde said, “I didn’t know who it was so I popped my head out and I saw his white shirt and I went back into the bathroom stall and I said, I am okay, please stop chasing me, I’m okay.” He did not make eye contact with Reiman or Maloney and said he “popped” his head out for about a second to see whose voice he had heard.

Respondent Aristilde did not deny that at some point he had his head over the toilet bowl. Respondent Aristilde said that his statement, during his official Department interview, “by no means was I heaving into the toilet bowl” was not an inaccurate statement because “heaving is involuntary.” In addition, he agreed that his statement, “I was coughing, I was in the communal area of the bathroom” was also not inaccurate because “I was [coughing] when I was using the sink when I was trying to get more of it out so I was coughing over there also.” He added that he was also coughing in the stall.

During cross-examination, Respondent Aristilde said that neither he nor Respondent Hamm was tense prior to the incident and that he knew for a fact that Respondent Hamm would never have discharged his O.C. pepper spray at him. He did not recall what Respondent Hamm had in his hand as Respondent Aristilde had his head tilted back. He was looking at Respondent Hamm, but not his hand. Respondent Aristilde agreed that he had observed Respondent Hamm remove the O.C. pepper spray from its holster. He stated that at the time of this incident, he would have pointed his O.C. pepper spray at Respondent Hamm as part of “horseplay,” but

would not do so today. Respondent Aristilde maintained that although he is aware that Respondent Hamm claimed that he discharged cherry flavored throat spray, he felt “relaxing,” “numbing,” and “minty” sensations.

Respondent Aristilde said that he tried to “hack” out the substance that was in his mouth and that he lined the toilet bowl with paper towels because he is “germaphobic.” He asserted that he was not involuntarily coughing. Respondent Aristilde recalled that he did not “dry heave.” He was confronted with his official Department interview, when he was asked, “[D]o you remember dry heaving at all,” and he had responded, “I only dry heaved when I was coughing because I was coughing. I coughed very hard for 30 seconds.” Respondent Aristilde explained that earlier during the interview, he had stated that he had not been dry heaving “and being as though I felt the lieutenant’s question was leading me to call it a dry heave. I was explaining to him as objectively as I could what I was doing in the bathroom.”

Respondent Aristilde testified that he had no recollection of being on his knees while he was in the bathroom stall. He testified that he had stuck his head out of the stall, but only to learn the identity of the person who asked him a question, not to engage in a conversation.

During redirect examination, Respondent Aristilde did not deny that he had leaned over the toilet bowl.

During re-cross-examination, Respondent Aristilde said that he was standing over the toilet bowl with his head above the bowl.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2011 5940

Specification No. 1

Respondent Hamm acknowledged that while he was on duty on October 9, 2011 inside of the muster room of the 104 Precinct he removed his O.C. pepper spray canister from his belt, pointed it at Respondent Aristilde's open mouth, and sprayed a substance into Respondent Aristilde's mouth. Respondent Hamm claimed that the substance he discharged into Respondent Aristilde's mouth was throat lozenge spray. The Assistant Department Advocates (the Advocates) argued that Respondent Hamm sprayed O.C. pepper spray into Respondent Aristilde's mouth.

I credit Respondent Hamm's claim that he sprayed throat lozenge spray into Respondent Aristilde's mouth because the record establishes that the lack of effect the spray had on other MOS who were present inside the muster room and the actions taken by supervisors after this spraying incident are more consistent with Respondent Hamm's claim that he discharged throat lozenge spray into Respondent Aristilde's mouth than it is with the Advocates' claim that Respondent Hamm sprayed O.C. pepper spray into Respondent Aristilde's mouth.

Uniformed MOS are trained that O.C. pepper spray can cause respiratory problems, can be dangerous to pregnant women, and should not be unnecessarily discharged, especially in a small, closed interior area.¹ Thus, for any uniformed MOS to discharge O.C. pepper spray inside the muster room of a precinct when numerous other MOS are present would constitute a highly unusual action and for an officer of the caliber of Respondent Hamm, who was described by his supervisors as an excellent officer, to do this would constitute an extremely unusual event.

¹ Patrol Guide Procedure No. 212-95, Note.

Any claim that an extremely unusual event has taken place must be closely examined.

Although Respondent Aristilde told Ricottone that he had been “Maced,” I credit Respondent Aristilde’s subsequent denials that the substance that Respondent Hamm discharged into his mouth was O.C. pepper spray because these denials are consistent with the lack of effect the spray had on other MOS who were present inside the muster room and the fact that Reiman and Maloney did not insist that Respondent Aristilde be examined by a medical professional.

The Advocates asserted that Respondent Aristilde’s coughing, “hacking” and “dry heaving” inside the bathroom after he was sprayed shows that the substance must have been O.C. pepper spray. However, since it is not disputed that Respondent Hamm’s hand was no more than six inches from Respondent Aristilde’s open mouth when the spray was discharged, it cannot be discounted that a discharge of any type of spray directly into a person’s throat area can result in coughing, “hacking” and “dry heaving.” The Advocates offered no expert medical testimony to establish that only O.C. pepper spray could have caused such a reaction, nor did the Advocates offer any expert medical testimony to establish that a close range discharge of a throat lozenge spray into a wide open mouth could not result in the coughing, “hacking” and “dry heaving” that Respondent Aristilde experienced.

The Advocates’ claim that Respondent Hamm discharged O.C. pepper spray inside the muster room is contradicted by the undisputed fact that none of the MOS who were present inside the muster room when the discharge took place smelled any O.C. pepper spray. If Respondent Hamm had actually discharged O.C. pepper spray into Respondent Aristilde’s mouth, even at close range, the smell of O.C. pepper spray should have permeated the muster room. Although Reiman testified that the discharge stream he observed appeared to be

consistent with O.C. pepper spray, he conceded that he has never personally discharged O.C. pepper spray.

Finally, I find it highly significant that the supervisors who were present apparently did not believe that Respondent Hamm had actually sprayed O.C. pepper spray into Respondent Aristilde's mouth because these supervisors did not comply with the provisions of Patrol Guide Procedure No. 212-95. Contrary to the requirements of this procedure, none of the supervisors requested response of EMS, or removed Respondent Aristilde outside to expose him to fresh air, or positioned him on his side or in a sitting position to promote free breathing, or provided assistance to him by flushing his face and mouth with profuse amounts of water.

Based on the above, I find that the Department did not prove that the substance that Respondent Hamm sprayed into Respondent Aristilde's mouth was O.C. pepper spray. Nonetheless, Respondent Hamm is found Guilty of this charge as worded because Respondent Hamm is specifically charged with having sprayed "a substance" into Respondent Aristilde's mouth. Since Respondent Hamm admitted that he sprayed a "substance" into Respondent Aristilde's mouth, Respondent Hamm is found Guilty as charged of Specification No. 1.

Specification No. 2

Respondent Hamm is charged with having made "false and or misleading statements" at his official Department interview. Specifically, the Department alleges that Respondent Hamm lied or misled when he gave the following answers to these questions:

- Q. Okay, and then go on, tell us what happened (DX 2, p. 10, line 20)
- A. I went over and I took my mace out, and I took out my throat lozenger, and I put them all in one hand, and I said, psssst. With the throat lozenger I hit him, I gave him a shot. (DX 2, p.10, lines 10-12)

- Q. Okay, and then you took your mace out.
- A. He said to me, "You shut my mouth." So he stood next to me, he opened his mouth, and I took my mace out and said, "Yeah?" And I had my throat lozenger in my hand. And I said "psssst" with the throat lozenger, I hit the throat lozenger, and then he choked, and he said "You're an ass," and he left. (DX 2, p.12, lines 6-10)
- Q. You did, Okay. Which hand did you take that out?
- A. Normally it's the left hand, but the thing about it is, see, I had just took a shot of my throat lozenger, so I had it on top of my - right on top of my gun on the magazine pouch, so when I pulled it up I had them both on my right hand.
- Q. So you - it's on your left side, you
- A. Right, I put them both in my right hand - (DX 2, p.12, lines 14-20)
- Q. You went across with your right hand to bring them up?
- A. No, no, no, I took it out with my left hand I switched it to my right hand. And then when he had his mouth open I shot him with the throat lozenger that I had. I said, psssst. (DX 2, p.13, lines 1-3)

Since I have found that the Department did not prove that the substance that Respondent Hamm sprayed into Respondent Aristilde's mouth was O.C. pepper spray, and that the Department did not prove that the substance that Respondent Hamm sprayed into Respondent Aristilde's mouth was not throat lozenge spray, the Department failed to prove that these answers were false or misleading.

Respondent Hamm is found Not Guilty of Specification No. 2.

Disciplinary Case No. 2012 6896

Respondent Aristilde is charged with having made "misleading statements" at his official Department interview. The Advocates contended that Respondent Aristilde misled his interviewers with regard to what Respondent Hamm had sprayed him with and with regard to his own actions inside the bathroom.

With regard to what substance Respondent Hamm had sprayed him with, the Department alleges that Respondent Aristilde misled his interviewers by his answers to the following questions:

- Q. Officer Hamm makes a statement to you to "take a walk, take a hike." (DX 3, p.12, line 17)
A. But he doesn't spray the mace, he sprayed something else. (p.13, lines 5-6)
- Q. And something was sprayed by Officer Hamm?
A. It was like mint, I was, what the hell was that? That's when I'm like - - I'm thinking it's Binaca. (DX 3, p.17, lines 8-10)
- Q. Right.
A. It's weird, it's a little minty. (DX 3, p.23, lines 16-18)

Since I have found that the Department did not prove that the substance that Respondent Hamm sprayed into Respondent Aristilde's mouth was O.C. pepper spray, the Department did not prove that Respondent Aristilde's answer, "But he doesn't spray the Mace, he sprayed something else," was misleading. As to the Advocates' contention that Respondent Aristilde misled his interviewers when he described the taste of the substance that Respondent Hamm sprayed into his mouth as "mint" and "a little minty," just because Respondent Hamm stated that he had sprayed cherry-flavored throat lozenge into Respondent Aristilde's mouth does not sufficiently prove that Respondent Aristilde falsely described the taste perception of the spray he experienced.

With regard to his own actions inside the bathroom, the Department alleges that Respondent Aristilde misled his interviewers by his answers to the following questions:

- Q. Yeah, they [supervisors] describe you as - - observing you as being basically on all fours with your head in the toilet bowl heaving.
A. No, by no means was I heaving into the toilet bowl. (DX 3, p.18, lines 18-21)

Q. Well that's not what they described as what they saw. So you're not saying do you remember giving any --do you remember dry heaving at all?

A. I only dry heaved when I was coughing, because I was coughing -- I coughed really hard for about, I don't know, 30 seconds.

Q. Where did this happen?

A. In the bathroom. No, well I was in the communal area in the bathroom. (DX 3, p.39, lines 9-16)

Q. Okay, and then what did they ask you? (DX 3, p.14, line 13)

A. Then like I popped my head out. I see Lieutenant Maloney, I'm like, - I'm fine, and I head back into the stall. (p.14, lines 18 19)

It is not disputed that none of the supervisors who entered the bathroom to see if Respondent Aristilde was alright ever entered the stall he was inside with the door closed. Thus, their observations of him were limited to what they could hear and what they could see by peeking underneath the door. Thus, as to the Department's claim that Respondent Aristilde misled his interviewers when he asserted that he had not been "heaving into the toilet bowl," no supervisor could see if Respondent Aristilde was actually vomiting rather than dry heaving, as he claimed. Also, although the Advocates argued that Respondent Aristilde misled his interviewers by asserting that at one point he "was in the communal area in the bathroom," since he entered the bathroom before the supervisors did, the Department did not prove that he was not in the communal area before he entered a stall.

Finally, the Advocates argued that Respondent Aristilde misled his interviewers by asserting that at one point he had "popped" his "head out" of the stall and told Lieutenant Maloney that he was "fine." Maloney corroborated Respondent Aristilde's claim that he told him that he was "fine" when he testified that Respondent Aristilde had told him that he was okay. As to Respondent Aristilde's statement that he had "popped" his "head out" of the stall, Maloney testified that he did not know whether or not Respondent Aristilde had popped his head

out of the stall. Since the Department failed to prove that these answers were misleading, Respondent Aristilde is found Not Guilty.

PENALTY

In order to determine an appropriate penalty, the Respondent Hamm's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222 (1974).

Respondent Hamm was appointed to the Department on July 2, 2001. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Hamm has been found Guilty of spraying a substance into Respondent Aristilde's mouth while they were standing face-to-face inside the muster room of the 104 Precinct.

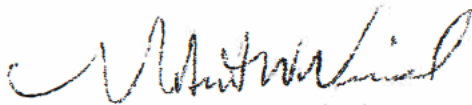
Respondent Hamm performed this prank in the presence of a sergeant and about ten other MOS and this prank-gone wrong had an adverse effect on the Department because Respondent Aristilde was not physically able to take his assigned post at CRV and had to be replaced by another officer.

Respondent Hamm was suspended for 31 days from October 9, 2011 until November 9, 2011. It is recommended that Respondent Hamm forfeit the 31 days he served on pretrial suspension.

APPROVED
DEC 31 2012

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,

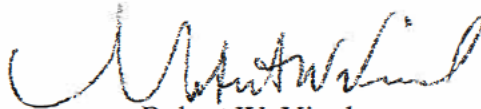

Robert W. Vinal
Assistant Deputy Commissioner - Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER YUSEFF HAMM
TAX REGISTRY NO. 928455
DISCIPLINARY CASE NOS. 2011-5940

Respondent received an overall rating of 4.0 on his 2011 performance evaluation, 4.5 on his 2010 evaluation, and 4.0 on his 2009 evaluation. He has been awarded one Meritorious Police Duty medal and seven Excellent Police Duty medals. [REDACTED]. He has never previously been found guilty of any formal disciplinary charge and he has no monitoring records.

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner Trials